In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1163

FRANK SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted, with two others, of conspiracy to violate the Dyer Act (18 U.S.C. 2312) and of one substantive violation of that statute by aiding and abetting the transportation of a stolen 1966 Pontiac from Texas to Nevada. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A.).[1]

[1] A co-defendant, Gurleski, whose conviction was likewise

The evidence showed that one Garner and petitioner, who was in the automobile salvage business in Austin, Texas, would supply titles, license plates, and serial plates from wrecked late model cars. Other co-defendants obtained stolen cars which physically matched the wrecked cars, removed the genuine serial numbers, and welded on those supplied by petitioner and Garner. The cars were then driven from Texas and sold in Nevada or California. Petitioner's participation in the scheme was shown primarily by the testimony of co-conspirators Hinton and Boyd, who pleaded guilty before trial (see Pet. App. A, 31-32).

The court of appeals has dealt fully with the principal contentions of error raised by petitioner in this Court (see Pet. App. A, 20-33). We rely on the court's opinion as to those issues in urging that certiorari be denied.[2] In his petition of one hundred and seventy-

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affirmed by the court in the same opinion, has filed a separate petition for certiorari, No. 1559 Misc., this Term, raising different issues from those presented here.

[2] *I.e.*, Pet. Questions 4-5 and 26-27 with respect to the giving of an accomplice instruction, discussed at Pet. App. A, 30-31; Pet. Questions 6-9 and 20-21 with respect to the trial court's refusal to permit cross-examination of a government witness as to the location of secret automobile identification marks and an allegedly prejudicial statement by the prosecutor in relation to this issue, discussed at Pet. App. A. 25-26; Pet. Questions 14-15 and 30-31 with respect to the denial of a motion for severance and refusal to permit comment by petitioner on the failure of his co-defendants to testify, discussed at Pet. App. A, 21-24; Pet. Questions 16-17 and 28-29 concerning the competency of the witness Hinton and alleged perjury by the witness Boyd, discussed at Pet. App. A, 27-29; Pet. Questions 18-19 concerning the denial of petitioner's motion to keep his prior criminal record from the jury, discussed at

one pages, petitioner also seeks to present a variety of claims which the court below found "so totally frivolous and without merit that they will be dismissed without discussion" (Pet. App. A, 20). No extensive treatment of these claims is warranted.

1. Petitioner contends that he was convicted on charges different from those contained in the indictment (Pet. Questions 1-3). This is based on allegations (a) that the trial judge improperly "amended" the indictment by granting the government's motion to dismiss counts 2 and 5 (Pet. 104-109); (b) that the instructions permitted the jury to convict petitioner under 18 U.S.C. 2(b)—"Whoever willfully causes [a criminal] act to be done * * * is punishable as a principal"—although the indictment charged, in the language of 18 U.S.C. 2(a), that he "aided, abetted, counseled, induced and procured the commission" of the offense described in count 4 (Pet. 112-118);[3] and (c) that the judge in reading the conspiracy statute to the jury, included the clause referring to conspiracies to "defraud" the United States, although petitioner was charged with conspiracy "to commit

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Pet. App. A, 26-27; and Pet. Questions 24-25 with respect to the sufficiency of the evidence, discussed at Pet. App. A, 31-33.

[3] The full answer to this argument is that it is not even necessary that the indictment refer to the aiding and abetting statute (18 U.S.C. 2) in order to sustain a conviction thereunder. *E.g., Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192; *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C.A. 9), affirmed, 336 U.S. 613; *Yeloushan* v. *United States*, 339 F. 2d 533 (C.A. 5); *United States* v. *Gerhart*, 275 F. Supp. 443, 465-466 (S.D. W.Va.). In any event, petitioner did not object to the instruction given. See Rule 30, F.R. Crim. P.

any offense against the United States" (Pet. 110-112). The indictment and the court's instructions, however, clearly apprised the jury of the nature of the conspiracy and substantive charges against petitioner.

2. Petitioner argues that the trial judge committed reversible error in failing to supply the jury with a written copy of his instructions, as requested by the defense (Pet. Questions 10-13). The jury, however, did not seek a copy of the court's charge. There was thus no abuse of discretion in declining to furnish it. *McDaniel* v. *United States*, 343 F. 2d 785, 789 (C.A. 5), certiorari denied, 382 U.S. 826; see *Oertle* v. *United States*, 370 F. 2d 719, 729 (C.A. 10), certiorari denied, 387 U.S. 943.

3. Petitioner contends that the trial court erred in admitting in evidence Government's Exhibit 5—an insurance claim file—and in sending it to the jury room (Pet. Questions 22-23). The company had insured a 1966 Volkswagen whose vehicle identification number was shown to have been welded onto the stolen 1966 Volkswagen which was the subject of count 3 of the indictment. The claim was paid after the car was wrecked and the parts were sold to Frank Smith Auto Parts. During the testimony of the custodian of the insurance records, the entire file was admitted into evidence as a business record. Petitioner contends that a memorandum contained in the file, set forth at Pet. 152,[4] was inflammatory and prejudicial.

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[4] The notation was that an F.B.I. agent who was "[t]rying to break a theft ring" had checked the file. He was advised that a witness could testify that the company had paid the claim and sold salvage to Frank Smith Auto Parts.

However, the memorandum merely refers to petitioner as the person to whom the wrecked Volkswagen was sold and does not purport to identify him as a member of an auto theft ring. Moreover, all counsel agreed on the exhibits which were sent to the jury room.

4. Petitioner contends that the trial judge erred in denying his request for a bill of particulars specifically to identify the "1966 Pontiac" mentioned in count 4 of the indictment, in view of the fact that count 2 (in which petitioner was not charged) also referred to a "1966 Pontiac" (Pet. Question 34). Count 2 was dismissed before the case was submitted to the jury. The stolen 1966 Pontiac whose transportation in interstate commerce petitioner was convicted of having aided and abetted was identified by the proof. There was no abuse of discretion in denying a bill of particulars. *Wong Tai* v. *United States*, 273 U.S. 77; *Johnson* v. *United States*, 207 F. 2d 314, 320-321 (C.A. 5), certiorari denied, 347 U.S. 938.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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